

3. Whether the alleged injury arose out of and in the course of Claimant's employment?
4. Whether timely notice was given by Claimant to Respondent?
5. Whether a timely written claim was made by Claimant?
6. Whether Claimant's failure to request medical treatment from Respondent bars Claimant from receiving compensation given that Respondent has the right to direct medical care pursuant to K.S.A. 44-510(a) and K.S.A. 44-515 and was not given an opportunity to do so? ²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was hired and started work for respondent on or about November 10, 1997. As a part of her orientation claimant was given an employee handbook. Claimant signed receipts for employee handbooks on November 10, 1997, and March 15, 1998. In that handbook, employees were instructed to immediately report all injuries to the employee's supervisor, manager or someone designated by their department. This policy was also posted on the bulletin board in the employee lunchroom and was periodically discussed with employees at meetings.

Initially, claimant's job was a day one analyst but she subsequently transferred into a position of disability case manager. Both jobs required computer keyboarding and use of a computer mouse. Claimant also used the telephone. She described her job as hand intensive.

In approximately December of 1999 claimant first noticed symptoms in her hands. Shortly thereafter she requested and was provided with an ergonomic keyboard and a wrist brace. These items were available to all the employees upon request and most of the workers in claimant's area had them.

Claimant was off work from December 2000 through April 2001 for a non-work-related condition. While she was off work claimant noticed the symptoms in her hands improved. After she returned to work her symptoms worsened. Her last day of work for respondent was May 16, 2001. After leaving work her condition did not improve this time. Claimant gave birth to a child in September 2001. On or about May 27, 2003, claimant

² Brief of Appellant Liberty Mutual Ins. Group at 1-2.

went to work for another employer performing a job similar to that which she had performed with respondent.

Claimant sought medical treatment on her own with orthopedic surgeon Mark J. McGuire, M.D., on February 13, 2002. Dr. McGuire's records from that date do not mention work-related injuries.³ Claimant returned to Dr. McGuire on October 30, 2002. At that time claimant discussed with Dr. McGuire her job duties with respondent. Dr. McGuire issued a report in which he noted "that carpal tunnel is frequently associated with repetitive activity of the hand and I think people that do a lot of keyboard work have a higher incidence of carpal tunnel, so I think likely her carpal tunnel syndrome is related to her work."⁴

Respondent contends that the first notice it received concerning an alleged work-related accident was the Application for Hearing filed with the Division of Workers Compensation on February 18, 2002. As this was received 278 days after claimant's last day worked, respondent is denying both timely notice of accident and timely written claim.⁵

Claimant's supervisor was Edaleen Luther. Ms. Luther testified that claimant never reported a work-related accident or injury to her. Ms. Luther further testified that she is the person designated to file accident reports for employees and, as such, was the person to whom claimant should have reported her accident. Ms. Luther said claimant never asked to see a doctor nor did she ever request a job modification due to any injury.

Vera Wheeler was claimant's department manager. She also testified that claimant never reported a work-related accident or injury to her and that she never was told that claimant had reported an injury to anyone else. Likewise, claimant never asked her for medical treatment nor for a job modification due to any injury or condition. The first time Ms. Wheeler became aware that claimant was alleging a work-related injury was after respondent received the Application for Hearing sometime in February 2002.

Claimant contends she told Jeannie Niegholdt that her hands were bothering her and that this satisfied her obligation to give notice of accident. Claimant testified she considered Ms. Niegholdt to be her supervisor. Ms. Niegholdt did not testify at the preliminary hearing. However, Ms. Wheeler testified that Ms. Niegholdt was a "senior

³ P.H. Trans. Resp. Ex. A.

⁴ P.H. Trans. Cl. Ex. 1.

⁵ K.S.A. 44-520; K.S.A. 44-520(a).

support person” with no supervisory role over claimant or anyone else. Ms. Niegholdt’s job was providing supplies and support to employees but not supervision.

Based upon the testimony of claimant and the uncontroverted medical opinion of Dr. McGuire the Board finds that claimant suffered personal injury by accident arising out of and in the course of her employment with respondent. In addition, the Board finds that claimant’s injury was a result of repetitive trauma from her regular job duties and, as such, occurred each and every work day through her last day worked. Accordingly, May 16, 2001, claimant’s last day worked, will be utilized as claimant’s date of accident for purposes of computing her time for giving notice and written claim.

K.S.A. 44-520 requires notice of accident to be given to the employer within ten (10) days after the date of accident. Notice to a supervisor or the employer’s duly authorized agent has been recognized as notice to the employer. But notice to a co-worker or to a someone not in a supervisory position with the employer does not constitute giving notice to the employer. Claimant admits she only told Jeannie Niegholdt about her hand condition. The record does not support claimant’s contention that Ms. Niegholdt was a supervisor. Furthermore, it is not clear precisely what claimant said to Ms. Niegholdt. Although claimant said she complained about her hands and that she related those symptoms to her work, Ms. Niegholdt apparently did not understand that claimant was reporting a work-related accident as no report was filed nor was this information passed on to either Ms. Luther or Ms. Wheeler. The Board finds claimant has failed to prove that she gave timely notice of accident as is contemplated and required by K.S.A. 44-520.

It is undisputed that claimant failed to serve respondent with a written claim for compensation within 200 days after the day of accident. Claimant contends that the time for making written claim was extended to one (1) year due to the employer’s failure to make a report of accident to the Director of the Division of Workers Compensation. However, K.S.A. 44-557 only requires an employer to make a report of accident within 28 days after receiving notice of an alleged work-related injury and, if the injury was “sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.” As claimant did not give notice and also never missed worked due to the injuries she is alleging in this case, no report of accident was required of the employer. Accordingly, claimant’s Application for Hearing was not timely to satisfy the time limitations of the written claim statute.

As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing of the claim.

WHEREFORE, the Board reverses the preliminary hearing order entered by the Administrative Law Judge on June 23, 2003, and benefits are denied.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Kathleen N. Wohlgemuth, Attorney for Respondent and Liberty Mutual Ins. Grp.
Ken Hursch, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director